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FIGHTING THE WAR BEHIND THE TRENCHES—THE LAWYERS' OPPORTUNITY*

This war is going to be fought in two places—in the trenches and behind the trenches. The one will be carried on by military forces; the other by civilian forces. In the opinion of Provost Marshal General Crowder the two services, though wholly differing in character, are of like importance. They require much the same treatment.

The military forces are being scientifically organized into suitable units with reference to special qualifications, and the personnel is undergoing intense specialization under expert guidance for the duty set for them to perform and the object they will achieve. They are officered by men who are prepared and who are consecrated to the duty of directing and guiding individual endeavor.

What of the citizen forces? They have not been organized and little official knowledge exists of the individual qualifications and specialization of the people of this country. Manifestly, there is in progress no training for the responsibilities and onerous duties and sacrifices that certainly lie before the American people as a Citizens Force, before there is forever destroyed the world wide menace of heroic kingship to civilization, liberty, justice, self-respect and even the Christian religion. One dares not insult the American spirit by the mention of compromise of these cardinal principles that have made America great. Then, it is for America a fight to victory or to death.

The Citizen Forces need organization. That is all. They need no selective draft for all must serve and all will serve in its invincible army. They must be armed with the martial spirit, subdivided into units in accordance with individual qualifications and, like their brethren in arms in the trenches, undergo specialized training for the thousands of peculiar tasks that are now partially done or wholly neglected.

A year ago there was sounded a nation-wide alarm on account of the unpreparedness of military forces. It was not suddenly that the people awakened to the dire emergency. It was only after an intensive campaign of education conducted by far seeing patriots, that they awoke like a sleeping giant and plunged into the fray. It *was* suddenly that Congress acted under the inspiration of eloquence, wisdom and consecration of the President and its own patriotic intentions.

The nucleus of an organization for the Military Forces already existed. Earnest, educated, well-trained and enthusiastic officers awaited but the authority to spring into action and draw around them a mighty, fearless and well-prepared army. How well and quickly they have done it history will tell in songs of praise.

Now, there is no vocal warning of the unpreparedness of the Civilian Forces. There is no organization and no co-ordination of individual effort. The individual civilian heart means right but the head goes wrong or is idle from lack of training and guidance in a nation-wide endeavor. There is too much repetition and lost motion. Warnings, rules and instructions, like danger, are meaningless to a misdirected or a sleeping people. There is needed an intense campaign of education

*This editorial, written by our Associate Editor, Mr. T. W. Shelton of Norfolk, Va., will, we are sure, interest our subscribers who are takin an active interest in the war. Mr. Shelton is Judge Advocate General of the state of Virginia and Chairman of the Central Legal Advisory Board, composed of the Attorney General, Mr. Caton of Alexandria, and Mr. Shelton. This board is very active and is setting the pace for boards of a similar character in other states. It is uniting the lawyers of Virginia into a mobile organization, under the particular guidance of committees of three in each selective draft jurisdiction. In a short time we shall ask Mr. Shelton to prepare an article descriptive of this work.

speaking in national, aye world-wide, terms, preaching the attitude of unselfish cooperation and the spirit of patriotic service and teaching the meaning of this war.

There is no nucleus of an organization around which the Civilian Forces may rally. But there are earnest, educated, well trained and enthusiastic officers awaiting but the authority and direction in order to spring into the vital campaign of preparing the Civilian Army that must fight the battles behind the trenches if the war shall be won. These men are America's lawyers.

Concretely, what shall the lawyers do? The answer is to follow the example of the soldiers. Let there be organization of an army of civilians comprising every patriotic citizen. Let this be divided into units analogous to the different arms of the military service and officered in like manner, such officers to be designated as chairmen and vice-chairmen instead of generals and captains.

Let the people be inspired by the realization of concert of action; that every endeavor, every sacrifice they are called upon to make is but one agency co-operating with others, surely achieving a designed objective. This will enthuse, maintain confidence and insure participation. It is the atmosphere of team work that spells victory and dispels lost motion and friction.

But, two things are conditions precedent to this enviable status. Each player must be taught his particular "bit" individually and each must be trained to perform it collectively in team work. Manifestly, this teaching and training of the citizen, with the assistance of intelligent laymen, is the work for the lawyer. He must captain the war behind the trenches and the sooner he starts the sooner the war will end. The Military Forces, both officer and private, are entitled to and deserve the moral support this mighty organized will power will give. A sorely tried President wholly deserves this concrete support. America needs it. But above and beyond all else, the people themselves need it. They need to be awakened, to personally participate, that they may undergo a real quickening of the spirit, such as wins victories; such as can fly upon the wings of faith and find lodgment in the stout hearts of America's soldiers in France. It will permeate every home, every camp and every trench. Then a grateful America will sing the praises of a resourceful, alert, patriotic and unselfish American Bar.

T. W. S.

NOTES OF IMPORTANT DECISIONS.

CORPORATION—DUTY OF PROMOTERS TO PROVIDE IMPARTIAL DIRECTORS.—Goodman v. White, 93 S. E. 906, decided by North Carolina Supreme Court, shows an action by the trustee of a bankrupt corporation against promoters, so called, but who seem to have been organizers of the corporation. Defendant was sued by the trustees upon a stock subscription for 82 shares of the corporation. It seems that to organize it the first step taken was to raise $4,000 on his note so as to buy out an existing corporation. This being effected the new corporation took up his note, as was intended. It does not appear how the other organizer acquired what was credited to him as 60 per cent of the stock in the new corporation. To the defendant giving the note for $4,000 there was issued $8,200 in stock. The trustee had judgment for this amount.

Here was a case where the merchandise of the old company constituted the actual capital of the new corporation. The real error occurred therefore, in overvaluation of that merchandise. The proportion between the organizers of 40 and 60 per cent seems to have had no real basis other than in the chance taken to have to pay the note given to raise money for the purchase of the property of the existing company. Promoters could have turned this merchandise over at a proper valuation, but they went about the matter in a wrong way. But even to do that properly the court said that "in organizing the intended corporation the promoters are required to see that it is provided with a board of directors which in dealing with them will act independently for the corporation and not for them."

Now, if the corporation took up note, as maker of the $4,000 note intended, that maker really paid nothing for the stock given to him, and in addition diverted $4,000 of its money to his personal debt. There was an appearance of finding to hand assets for a new corporation which really had been purchased for it. The stockholder further complicates the situation by making the $4,000 equivalent to $8,200 in stock.

It seems to us, that the $8,200 stock was a fiction not to be enforced, unless some creditor was deceived into trusting the new corporation on an inflated capitalization. There is a presumpton even against such a stockholder. We doubt, however, very greatly whether defendant should have been held for more than $4,000.

PUBLIC UTILITIES—STATE COMMISSION DECLINES TO ORDER IMPROVEMENT "NOT DIRECTLY PROMOTIVE OF THE CONDUCT OF THE WAR."—As an instance of the spirit that is actuating some of the public service commissions of the country in the present crisis, the following excerpt from a recent unanimous decision of the Public Service Commission of New Hampshire, denying an application of the City of Manchester for authority to construct Woodland Avenue at grade over the tracks of the Boston & Maine Railroad, is of interest:

"But above and controlling all other considerations is the fact that this country is now in a state of war, and among the most important instrumentalities for the successful conduct of the war is our railroad system. Every effort is being made to co-ordinate the railroads of the country into a single system, under a single head, in such wise as to make available for each, as needed, the resources of all. The strain laid upon the railroads by the demands made upon them for the transportation of men, materials, and supplies is stupendous. It has come upon them at a time when their facilities and equipment have already proved inadequate for the handling of existing business, and when all our producers of the needed equipment and facilities are straining every nerve to meet the requirements of the allied armies at the front. And with us the situation is aggravated by the fact that this unparalleled strain has fallen upon a bankrupt railroad.

"We do not say that we will in no case order expenditure by our railroads not directly promotive of the conduct of the war. But it should be understood that so long as the public receives a service reasonably approximating that to which it was accustomed in times of peace and where the public safety is not manifestly and imminently endangered, we cannot be expected to order our railroads to expend large sums of money on improvements having no tendency, directly or indirectly, to enable them to better carry on what is now their supreme business—the business of the war—or to facilitate the distribution of food, fuel and other necessares of life.

"Improvements desirable in times of peace, for the purposes of peace, will have to wait until peace comes."

FALSE PRETENSES—INDORSING AND DELIVERING CHECK KNOWING MAKER IS WITHOUT FUNDS IN BANK.—Siegel v. Com., 197 S. W. 467, decided by Kentucky Court of Appeals, held that a statute denouncing the offense of drawing or uttering a check, etc., knowing at the time that the maker or drawer has not sufficient funds in bank on which it is drawn to pay it on presentment, embraces not only maker or drawer, but an indorser or other person making use of such check with knowledge that the maker or drawer has no funds in bank to pay same.

The court said: "Its (statute's) meaning clearly is that one who with intent to defraud shall make, or draw, or utter, or deliver the check, draft or order for the payment of money upon any bank or other depository, though it be not forged, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds therein for the payment of such check, draft or order in full upon presentment, makes himself answerable to the punishment provided by the section. Neither the inhibition contained in the statute nor the punishment provided for its violation is confined to the maker or drawer of the check, draft or order."

The court then distinguishes between a maker and indorser, in that the venue as to the former is where the maker executed the paper and that as to the latter it is the county where he delivers same.

It seems to us, that strict construction may be violated in this ruling. Of course by statute there might be different places of venue, if expressly so stated, but it stretches a statute's terms aimed certainly at checks drawn by one who has no funds to pay them. There is a presumption of lawful currency of a paper when made to the order of another, especially when by general law the obtaining of goods

by fraudulent pretenses would apply to an indorser with guilty knowledge. It might be thought that the statute is aimed only at one who fraudulently puts out a paper with all the earmarks of negotiability.

Furthermore, a payee indorsing same in another state could by no means come under the prohibition of the statute, though he might be amenable to a statute of his state in obtaining money by false pretenses. If the statute cannot embrace one indorser as well as another, it ought not to be construed to embrace any indorser using the check to obtain money or property through fraud.

THE "SIGNERS" AND THE CONSTITUTION.

Some of the more progressive political scientists of recent years have asserted that the American Constitution is an undemocratic document, framed by reactionaries, and entirely out of touch with the spirit of the men who had fathered and fostered our war for freedom. As to whether the Constitution is a reactionary document will depend on one's interpretation of history; as to the second proposition, we have more definite information.

The writings of J. Allan Smith and C. A. Beard are typical. The latter in his book, "The Supreme Court and the Constitution," states:[1] "Quite naturally the men who led in stirring up the revolt against Great Britain and in keeping the fighting temper of the Revolutionists at the proper heat were the boldest and most radical thinkers—men like Samuel Adams, Thomas Paine, Patrick Henry and Thomas Jefferson. They were not, generally speaking, men of large property interests or of much practical business experience. * * * They associated strong government with monarchy, and came to believe that the best political system was one which governed least. A majority of the radicals viewed all government, especially if highly centralized, as a species of evil. * * *

"Jefferson put the doctrine in concrete form when he declared that he favored newspapers without government to government without newspapers. The Declaration of Independence, the first state Constitutions, and the Articles of Confederation bore the impress of this philosophy."

Beard's declaration that the war of 1776 and allied acts represented the democratic thought of the country is supported by J. Allan Smith, who maintains[2] that the conservative classes "prior to the Revolution had largely shaped and molded public opinion; but their opposition to the movement which they were powerless to prevent, destroyed their influence, for the time being, in American politics. * * * This gave to the revolutionary movement a distinctly democratic character."

The Convention of 1787 once more saw the conservatives in power. "The radicals, however, like Patrick Henry, Jefferson and Samuel Adams, were conspicuous by their absence from the convention. * * * They were not convened to write a Declaration of Independence, but to frame a government which would meet the practical issues that had arisen under the Articles of Confederation."[3] "With the return of peace these classes, which so largely represented the wealth and culture of the colonies, regained in a measure the influence which they had lost. This tended strongly to bring about a conservative reaction."[4]

Enough has been quoted to show that (1) the Revolution is regarded as an expression of democratic thought, and (2) that the Federal Constitution represents a return to power of "the solid, conservative, commercial and financial interests of the country."[5] Indeed, "conservatism and thorough distrust of popular government char-

(1) P. 77, et seq.

(2) Spirit of American Government, p. 16.
(3) Beard, p. 88.
(4) Smith, p. 27.
(5) Beard, p. 75.

acterized throughout the proceedings"[6] of the convention which adopted the Constitution.

I think we may safely assert that the Declaration of Independence fully represented the war for freedom and that its signers represented the spirit of the boldest, most progressive men of the age. "To this new and popular view of government the Declaration of Independence gave expression."[7] Beard, as before quoted, made practically the same statement.

This being the case, can we not say that the opinions of the signers of the Declaration of Independence on the adoption of the new Constitution, would strongly indicate whether or not that document was really "reactionary?"

The writings of both Smith and Beard would lead us to believe that a majority of the "signers" opposed the Constitution. "The Federal Convention assembled in Philadelphia only eleven years after the Declaration of Independence was signed, yet only six of the fifty-six men who signed that document were among its members."[8] A large majority of the "signers," as a matter of fact, favored the Constitution.

Smith, indeed, leaves himself a loophole of escape by declaring[9] that "many of those who had espoused democratic doctrines during the Revolution became conservatives after the war was over." This is given, however, as a qualifying statement and not as a statement that any large number had changed their views. It is made to show that the return to power of the pre-war conservatives was furthered by the change in sentiments of some of the radicals. Certainly, no one can claim that this would explain such a large preponderance in favor of the Constitution as existed among the signers of the Declaration of Independence.

Of the fifty-six signers, thirteen had died before 1787, the list including Whipple of New Hampshire, Hopkins of Rhode Island, Livingston of New York, Stockton and Hart of New Jersey, Morton, Taylor and Ross of Pennsylvania, Rodney of Delaware, Lynch and Middleton of South Carolina, Gwinnett of Georgia, and Hewes of North Carolina. To this list I add the name of Thomas Stone of Maryland, who died on October 5, 1787, less than three weeks after the Constitution was signed. This leaves forty-two names to be considered.

Six of these—Sherman of Connecticut, Franklin, Robert Morris and Clymer and Wilson, of Pennsylvania, and Read of Delaware—signed the Constitution as members of the Philadelphia convention.

Two other members of the Convention who did not sign the Constitution favored it strongly. These are Wythe of Virginia, and Walton of Georgia. It is sometimes said that Wythe refused to sign the Constitution, which is untrue. At the time he was not in Philadelphia, having returned home early in June, because of serious illness in his family. Madison, on June 4, reported that he had gone home. In a letter of July 16, 1787, Wythe mentions his withdrawal and says that the cause was becoming graver.[10] As a member of the Virginia ratifying convention Wythe voted for the Constitution's adoption.[11] "No four men excited more influence in favor of the Constitution in Virginia than George Washington, Edmund Pendleton, George Wythe and James Madison."[12] Walton was a member of the Convention, but did not attend its meetings. He was a member of the State Convention from Burke County. The convention unanimously ratified the Federal Constitution, Walton being one of the signers.[13] Elbridge Gerry, another member of the 1787 Convention, refused

(6) Smith, p. 33.
(7) Smith, p. 13.
(8) Smith, p. 33.
(9) P. 28.

(10) Farrand, III, 59.
(11) Elliot, III, 587.
(12) Grigsby, "Virginia Federal Convention of 1788," I, 42.
(13) American Historical Association 1901, II, 21.

to sign the Constitution. Illness prevented the attendance at the Convention of Abraham Clark of New Jersey, who, however, opposed the new Constitution.[14]

Several others, as members of state ratifying conventions, expressed their opinion of the Constitution. Three opposed it; ten supported it. The opponents were Chase of Maryland,[15] Paca of Maryland,[16] and Harrison of Virginia.[17] The supporters included Rush of Pennsylvania,[18] John Hancock and Samuel Adams of Massachusetts,[19] Bartlett of New Hampshire,[20] Huntingdon of Connecticut, then governor,[21] Wolcott of Connecticut, then lieutenant-governor,[22] Williams of Connecticut,[23] M'Kean of Delaware,[24] Rutledge of South Carolina, and Heyward of the same state.[25]

Most of the other members, not attending either the federal or state conventions, have had their views recorded.

A letter of December 16, 1787, to Jay, shows John Adams to have strongly favored the Constitution, as did Robert Treat Paine of the same state of Massachusetts.[26] Both President Witherspoon[27] and Hopkinson[28] of New Jersey, were friends of the new organic law. So was Hooper of North Carolina.[29]

Charles Carroll of Carrollton, was a staunch advocate of the Constitution. Because of the importance of state questions he had declined an appointment to the Philadelphia convention. B. C. Steiner quotes as follows from a letter of Washington to Madison, dated November 5, 1787: "So far as the sentiments of Maryland, with respect to the proposed Constitution, have come to my knowledge, they are strongly in favor of it. * * * Mr. Carroll of Carrollton, and Mr. Thomas Johnson are declared friends of it."[30] Carroll favored holding a convention for "assent and ratification" of the proposed Constitution.[31] "In Anne Arundel County the powerful influence of the Carrolls and the Worthingtons was cast for ratification without amendment."[32]

Richard Henry Lee of Virginia, opposed the new instrument, as did Francis L. Lee.[33]

Thomas Jefferson was opposed to the Constitution. He was not, however, a vigorous opponent. "While heartily wishing its adoption, he desired, in addition to its specifications, a Bill of Rights."[34] Jefferson was understood at the time to be opposed to the adoption and for that reason, therefore, I include him among the opponents. Thus, in the North Carolina Convention of 1788, Willie Jones, leader of the Republicans, quoted a letter from Jefferson expressing the hope that nine states would ratify, and thus secure union, and that four should reject and thus render certain the reception of proposed amendments.[35]

There is no direct statement of William Ellery's views, but circumstantial evidence is so strong that he must be included among the friends of the Constitution. Immediately after the state of Rhode Island ratified the Constitution, Washington appointed Ellery collector of United States Customs at Newport. It is well-known that Washington took care to appoint only strong friends of the government to federal positions in Rhode Island. "In the Rhode Island appointments it would certainly have

(14) Sanderson, "Biographies of the signers," II, 303.
(15) Elliot, II, 556. For some account of his opposition see Am. Hist. Rev., V, p. 28; also p. 38.
(16) Elliot, II, 549.
(17) Elliot, III, 629.
(18) Sanderson, III, 23.
(19) Elliot, II, 178.
(20) Sanderson, I, 286.
(21) Elliot, II, 200.
(22) Elliot, II, 202.
(23) Sanderson, II, 90.
(24) Elliot, II, 418. M'Kean was a member of the Pennsylvania convention, having removed to that state.
(25) Elliot, II, 338.
(26) Sanderson, I, 193.
(27) Sanderson, II, 240 et seq.
(28) Sanderson, II, 278.
(29) Moore, History of North Carolina, I, 377.
(30) American Historical Review, V, 22.
(31) Ibid, p. 30.
(32) Ibid, p. 38.
(33) Grigsby, I, 49. See also articles in "Notable Americans."
(34) Powell, Nullification and Secession, p. 7.
(35) Life of Iredell, II, 234.

been suicidal if the enemies of the federal government had received recognition. The state had given its adhesion to the Union at a late date and by a slender majority, and the 'antis' could not safely be given any opportunity of undoing the work which the Federalists had accomplished with so much difficulty."[36] The fact of being "a friend of the Constitution and a Federalist" played "a very important part" in Washington's Rhode Island appointments.[37] Writing of Ellery, another author says: "During the period of embarrassment and agitation arising from a depleted currency, from opposition to the new Constitution, and sympathy with revolutionary France, he contributed largely to the journals of the day, without his name, in behalf of order, public faith and an efficient government."[38]

The position of nine of the signers is unknown to the author. Thornton of New Hampshire, was a conservative in all probability, but nothing definite is ascertainable concerning his views on the adoption. Lewis Morris of New York, was a half-brother of Gouverneur Morris, one of the framers of the Constitution, and was usually in accord with his brother, having resigned his seat in Congress in the latter's favor in 1777. In all probability he favored the new government. John Penn of North Carolina, probably favored the Constitution, having had personal proof, as tax-receiver, of the failure of the Articles of Confederation. James Smith of Pennsylvania, was a Federalist and disciple and friend of Washington and presumably would have favored the ratification of the new document. Carter Braxton of Virginia, however, was closely associated with Harrison, an opponent, and presumably opposed it. Both he and Harrison had been injured by an act of Congress, limiting the terms of members.[39] Wm. Floyd of New York, was a Jefferson elector in 1802 and was a strong friend of the President. The views of Francis Lewis, Thomas Nelson and Lyman Hall are not only unknown, but there are no facts to indicate the possible position they took.

It is claimed, as we have seen, that the Constitution is a reactionary document and that this is evidenced by the fact that its framers were not in sympathy with the views of the men who had encouraged our war with England, the latter class being adequately represented by those who had the temerity to sign the Declaration of Independence.

Careful investigation has, however, disclosed the following facts as to the attitude of the "signers" on the adoption of the Constitution: Twenty-five favored and only eight opposed it. The views of the other nine are unknown, though probably three would have been inclined to favor and two to oppose the Constitution.

St. Paul, Minn. NOEL SARGENT.

(36) American Historical Review, I, 275.
(37) Ibid, 279.
(38) Sparks, Library of American Biography, VI, 130.
(39) Grigsby, I, 52.

LIABILITY FOR INJURIES DUE TO ALLEGED SUCTION FROM PASSING TRAINS.

Every person who had occasion when a child to frequent railroad yards or tracks no doubt was warned to keep away from moving trains on account of the danger of being sucked beneath and ground to pieces. Whether this is a false idea fostered in the minds of anxious mothers and nurses, or is in truth a real danger, this article will not attempt to state. It suffices to say that this idea, whether true or false, has been the basis of a number of lawsuits which have come before the courts of the country, the results of which have been almost universally in favor of the railroad. Actions of this kind are usually based upon the evidence of men who have seen newspapers and trash drawn beneath a moving train and upon testimony of college professors, who claim to have made certain observa-

tions as to the effect of fast moving trains upon objects placed near the track. However, the courts, as a rule, refuse to consider such evidence, as is illustrated by the case of Graney v. St. Louis, I. M. & S. R. Co.,[1] wherein the court said:

"The only knowledge in the wide, wide world that a train moving at a given rate of speed would generate a current of air that would suck under its grinding wheels a boy nearly twelve years of age, if standing within one or two feet of the track, was confined and confided to the two learned professors, who, like the Scottish maiden, the mother of the ghost child, 'hid their secret in their breasts,' and, though they did not, like her, 'die in travail unconfessed,' yet might as well have done so, so far as informing defendant was concerned."

It is well to note here that the professors referred to above did not state positively that a person could be drawn beneath a passing train, but that the pressure of the air from it would have a tendency to topple one over and make him lose his footing, and in this way he might fall beneath the train.

The case of Louisville & Nashville R. Co. v. Lawson[2] is a leading one on the subject here discussed. The facts are:

Simpson, a boy fifteen years old and weighing about 100 pounds, was sent out on the railroad track to look for his father. He went upon the defendant's right-of-way and started walking along a pathway near the tracks. After he had been walking up and down the right-of-way for some time, he saw a train approaching about 100 feet from him. As the train approached, he moved to the edge of a ditch about six feet from the track. While walking along the edge of the ditch he claimed to have been drawn under the train and severly injured.

The action for damages was predicated upon the negligence of the defendant in failing to moderate the speed of the train so as to prevent plaintiff's being drawn thereunder.

(1) 157 Mo. 666, 57 S. W. 276.
(2) 161 Ky. 39, 170 S. W. 198.

The plaintiff introduced evidence that moving trains would draw paper and mail-bags beneath them. One person also testified that he had seen a train draw a man under it, but this evidence was very unsatisfactory, in that the witness could not state who the person was or where it happened. The defendant proved by practical railroad men that they had never heard of a person being drawn under a train and did not believe it possible.

The court in holding that the defendant was entitled to a directed verdict, said:

"We deem it unnecessary, for the purpose of this case, to pass on the question of the possibility of such an accident. We content ourselves with saying that, even if possible, the probability of its occurrence is so remote that it cannot be said to be an accident which should, in the exercise of ordinary care, be reasonably anticipated by those operating railroad trains. That being true, a railroad company does not owe the licensees walking along the side of its tracks, and who know of the approach of trains, the duty of moderating the speed of the trains so as to prevent their being sucked under the trains. This court has adopted a very liberal rule with respect to licensees on tracks of a railroad company. Where in populous or thickly settled communities the tracks are used by such large numbers of persons that the presence of persons on the tracks may be reasonably anticipated, we are committed to the doctrine that it is the duty of the company under such circumstances to keep a lookout, to give warning of the approach of the train and to have the train under reasonable control.[3] The reason for requiring trains to be under reasonable control is to make the lookout effective; that is, to enable those in charge of the trains to stop them when persons are seen on the tracks or so near them as to be in danger of being struck by the trains. Here we are asked to go a step further and to say that the speed of the train must be reduced, not only to avoid striking persons on or near the tracks, but to prevent persons otherwise in a place of safety from being sucked under the train. Even in the Murphy case the court said: 'To compel the railroad trains to creep along under full control, in antici-

(3) Ill. Cent. R. Co. v. Murphy, 123 Ky. 787, 97 S. W. 729.

pation of what probably would not occur, viz., the meeting or overtaking a stray trespasser, would not be reasonable, because most likely wholly unnecessary. * * *'

"The number of persons actually sucked under trains, even if such cases ever occur, is so infinitesimally small it would certainly be unreasonable to require railroad companies to reduce the speed of their trains for the purpose of avoiding such accidents. If there be any danger from suction, certainly a licensee, who knows of the approach of a train and has a reasonable opportunity to do so, must get away from the track a sufficient distance to avoid being injured in that way."

The case of Graney v. St. Louis, I. M. & S. R. Co.,[4] *supra,* was an action for the death of a boy about twelve years old, who, while attempting to cross a railroad track, waited on a street crossing for a train to pass. He was standing about three feet from the track and was probably thrown down by the force of the air from the train and rolled under it. There were two appeals of the case. In the first the court held that there was sufficient evidence of negligence of the railroad company in operating its train in violation of a speed ordinance to take the case to the jury. However, on a later appeal a majority of the court were of the opinion that the accident was one which could not have been reasonably anticipated and therefore the company was not liable.

In the case of Davis v. Southern Ry. Co.,[5] it appeared that the plaintiff was walking on defendant's right-of-way and was overtaken by a freight train. Plaintiff's companion stated that he heard the train coming some time before it reached them and he warned plaintiff to look out for it. However, plaintiff stated that when he looked around the engine was right upon him, and shortly afterwards he was drawn under one of the cars by suction, which was caused by the speed of the train, and severely injured. The speed of the train was estimated at from six to thirty miles per hour. There was evidence of section men that trains running exceeding thirty miles per hour had frequently passed close to them without any such effect being produced. There was also testimony that the effect of a fast moving train would be merely to split the air and drive objects away from it. The court, in sustaining a non-suit given by the lower court, said:

"A railroad company is not under any legal obligation to regulate the rate of speed of its trains for the convenience of those using its right-of-way, for its tracks are always places of danger, and the pedestrian, who can easily step aside and avoid any danger, should do so on the approach of a train. He cannot require the company to slow up any more than to stop. He must look out for trains and take care of himself, and the engineer had the right to suppose that he has done so, or that he will do so in time to save himself. He must expect trains at all times, for he does not control the schedules of the company, and, besides, it has the right to run extra trains and to use its tracks for its purposes at any hours it chooses in the transaction of its business as a public carrier, and cannot be lawfully obstructed or impeded in the prosecution of this right, or prevented from its free and full exercise, in order to take care of those who go upon its property as trespassers, or as licensees, who are there by sufferance only."

Further along the court said:

"We are not bound to believe that has been done which is impossible according to the ordinary laws of nature, and this judicial notice extends to distance and speed and their relation to each other where the question is so presented as to require but the exercise of a little common sense, which even judges are supposed to possess, to determine how the fact is. It must be remembered, too, that Jennings (his companion) said that he did not feel any force of the wind, as the train passed by them, and he was almost touching the plaintiff as they walked along the Seaboard track together, and plaintiff said the force of the wind pushed him out, not in, and knocked him down, he scrambled to get away, and his leg was cut off. The utter improbability that he was sucked under the cars is shown

(4) Supra.
(5) N. C., 87 S. E. 745.

by this story when compared with the other evidence, and our common knowledge that such is not the case at that part of the train, there being nothing to create a vacuum and cause an inrush of air, so as to create a suction towards the car. The force of the air would be outward, centrifugal, rather than centripetal, and this is what knocked him down, if it be true that he fell and lost his leg in that way."

In the recent case of Southern Ry. Co. v. Young,[6] the court, in discussing the liability of railroads for injuries alleged to have been caused by suction from passing trains, holds that if accidents of this kind should be anticipated by those in charge of trains, they should likewise be anticipated by the persons injured and they should guard against such accidents. The following is quoted from the opinion:

"If under the operation of natural laws, those in charge of the train should have anticipated that the plaintiff, who was standing near the track along which the train was moving rapidly, would probably be sucked under, in, or close up to or against the train, then the plaintiff would likewise have been bound to anticipate the same result. And if the accident was unusual and extraordinary, and the plaintiff in the exercise of ordinary care and diligence for his own safety could not have anticipated such result, neither could those in charge of the train be expected to anticipate this result."

It is to be noted here that there is a line of cases, particularly in New Jersey, which hold that it is a question for the jury as to whether or not a railroad company is liable for injuries to prospective passengers on station platforms caused by the wind and suction from a fast moving train which gave no warning of its approach.[7] However, in the case of Koslowski v. Rochester, S. & E. R. Co.,[8] the court held that the company was not liable where the passenger on the platform saw the train coming. The court said:

"A fast railroad train passing a local station is not required to slow down unless there is something to indicate to the engineer that it is prudent to do so. If two or three people are standing on the platform he is not to assume that they will step in front of the train or approach dangerously near it. The same rule should obtain in the operation of rapidly running cars on a street surface railroad. Even if the motorman saw the plaintiff and his companion, and if vigilant, he should have seen them, their presence on the platform would not suggest that they were in any danger from the car. * * * The car was in plain view of the plaintiff for at least 1,200 feet. He knew that it was coming very rapidly and without any slackening of speed. * * * He kept his position unchanged, when a step back would have placed him beyond the possibility of danger."

In conclusion, it seems that the courts, as a rule, give little weight to the belief and evidence that a living object, capable of the least resistance, can be drawn under a moving train by suction. However, conceding, for the sake of argument, that such an accident is possible, the courts go further and say that it is an accident which cannot, in the exercise of ordinary care, be reasonably anticipated by those operating trains, and that the engineer has the right to presume that one who knows of the approach of the train will get away from the track a sufficient distance to avoid being struck by the train. The cases which have been quoted at length appear to be sound and well reasoned, and the precedent they have set will no doubt be followed by most of the courts of last resort in the event this question arises.

H. L. WALKER.

Washington, D. C.

(6) Ga., 93 S. E. 51.

(7) See Munroe v. Penn. R. Co., 85 N. J. L. 688, 90 Atl. 254; Schulz v. New York, S. & W. R. Co., 87 N. J. L., 659, 94 Atl. 579; Crotshin v. Penn. R. Co., 87 N. J. L. 11, 93 Atl. 110; and Paulding v. New York C. & H. R. Co., 116 N. Y. Supp. 518.

(8) 126 N. Y. Supp. 609.

DEAD BODIES—RIGHT OF BURIAL.

AWTREY v. NORFOLK & W. RY. CO.

Supreme Court of Appeals of Virginia. Sept. 20, 1917.

PRENTIS, J. The plaintiff in error, Mrs. S. C. Awtrey, complains of a judgment sustaining a demurrer to her declaration in an action against the Norfolk & Western Railway Company, the defendant in error.

The substance of the complaint is thus stated in the petition for the writ of error:

"The declaration complained of a failure on the part of the defendant to properly collect and prepare for burial the dismembered portions of the body of plaintiff's son, who was killed by a train of the said defendant company and for failure to notify plaintiff of her said son's death, thereby withholding from her the body of her said son, and depriving her of the solace and comfort of properly burying same."

The action is based upon an established common-law doctrine. It is well settled that the near relatives of a deceased person have a legal right to the solace of burying the body and that any interference with that right, whether by mutilation of the body after death, or by withholding it from the relatives, is actionable.

In Finley v. Atlantic Transport Co., 90 Misc. Rep. 480, 153 N. Y. Supp. 440, in which a steamship company was charged by a son with burying his father's body at sea when the ship was almost in port, although the company had already embalmed the body, had enough of his money to pay all expenses incurred, and from documents found in the possession of the father knew the son's address, a demurrer to the complaint was overruled and it was held that the action would lie. In a carefully considered opinion by Shearn, J., the cases are collected and the doctrine reiterated. It will be noted, however, in this case that the son was forever denied the privilege of burying his father, because the steampship company had unnecessarily buried the body at sea.

In Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, the action was brought by a widow for the wrongful mutilation and dissection of her husband's body, and the plaintiff was allowed to maintain the action. The doctrine is also well stated in 8 R. C. L. 695, 696; Keys v. Konkel, 119 Mich. 550, 78 N. W. 649, 44 L. R. A. 242, 75 Am. St. Rep. 428; Darcy v. Presbyterian Hospital, 202 N. Y. 259, 95 N. E. 695, Ann. Cas. 1912D, 1238.

The conceded facts in this case are that the dead body of the son of the plaintiff was found upon the railroad of the defendant in a mutilated condition on the morning of the 30th day of August, 1915; that at some time during that morning the body was taken charge of by the coroner, under the statute (Code Va. 1904, ‡ 3938 amended by Acts 1910, p. 338), which requires such coroner, upon notice of a "sudden, violent, unnatural or suspicious death, * * * to view the body and make inquiry into the circumstances of the * * * death," etc. It seems to be probable that the servants of the railway company allowed the body to remain undisturbed for a few hours until the coroner had been notified, under the view that it would be unlawful for any person to disturb it until after the coroner came. While this is a mistaken view of the law, at the same time it is held by many persons, and it is undoubtedly true that in many cases, it is proper that nothing should be disturbed until all of the physical facts can be judicially ascertained by the coroner (Forde's Case, 16 Grat. [57 Va.] 552), and in order to secure the available evidence to aid the authorities in determining whether the death was due to accident or to crime.

In this case there appears to have been no unusual delay. After the coroner had completed his duties, he, as required by section 3946, in view of the fact that the deceased was a stranger, caused his body to be decently buried.

It further appears that there were found on the body certain letters which indicated the address of the dead man's mother and brother in Georgia, and that the railway employes knew of these letters and replaced them upon the body. The coroner subsequently, in about two weeks, notified the relatives in Georgia, and the mother came to Virginia, disinterred the corpse, and gave it burial in Georgia in accordance with her own views of propriety.

These facts disclose no conduct on the part of the railway company which subjects it to an action for damages.

The declaration is also demurrable because argumentative, the allegation being that the employes of the railway company—

"discovered, and left where found, the dismembered portions of the body of the deceased on said railway company's tracks, roadbed, and right of way; that there were letters and other papers on the person of said deceased showing

the name and address of his mother, the plaintiff, and of his brother; and that said servants and employes found said letters upon the body of said deceased. And plaintiff avers that it became and was the duty of said defendant to follow up the information contained in said letters, and to notify deceased's said relatives, including plaintiff, of his death; to collect and prepare for burial, in a proper way, dismembered portions of the body of deceased; not to withhold from plaintiff the possession of said body; and to notify his said relatives, including plaintiff, who avers that she had the right to the care and custody of the body of her said deceased son."

There is no allegation here of any withholding of the body, and, indeed, that allegation could not have been made under the admitted facts of the case. It is simply argued that by failing to notify the plaintiff the company thereby withheld the body. There can be no right of action in such a case, unless there is some affirmative act on the part of the defendant, such, for example, as the act of the steamship company above referred to in unnecessarily burying the body of a passenger at sea, and thereby withholding it from his son and thus depriving him of his right to give it such burial as he deemed proper. While there is a common-law duty resting upon one who finds a dead stranger upon his premises to give him decent burial, it cannot be charged in this case that the company has failed in any such duty, because under the Virginia statute the coroner intervened and performed the duty which would otherwise have rested upon the company.

While there was on the part of the coroner an unreasonable delay in notifying the relatives in Georgia of the decedent's death, and while the agents of the company may be properly subject to some criticism for failing to do so it cannot be said that any legal right of the plaintiff has been interfered with, for as a matter of fact she did ultimately exercise her right to bury her son, and at no time did the defendant company after his death either multilate his body or withhold it from her possession.

The plaintiff's real grievance is her mental anguish because of the tragic death of her son and the heartrending and deplorable circumstances of his burial in Virginia, but under well-settled principles, she cannot recover for this, because there can be no recovery for mental anguish which is unaccompanied by actionable physical or pecuniary damage caused by the wrongful act of another. Connelly v. Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919; C. & O. Ry. Co. v. Tinsley, 116 Va. 603, 82 S. E. 732.

We are of opinion that there is no error in the judgment of the trial court.

Affirmed.

NOTE.—*Right of Action for Mutilation of Corpse by Person Having Duty to Bury Same.*—The connection between right and duty as creating right of action in such a case as burial of remains is not strictly logical. But courts have reasoned out that this duty is so founded in privilege that the right to sue for interference therewith exists in him upon whom the duty falls. It is easy, however, with this being conceded, to reason to the conclusion that mutilation is an active interference, whether that be malicious or arising out of negligence.

Thus in Floyd v. Atl. C. L. Ry. Co., N. C., 83 S. E. 519, L. R. A. 1915 B, 519, it was held in an action by the mother of deceased, who joined her husband as a nominal party, action could not be maintained for mutilation of her son's corpse.

The majority of the court go upon the theory that for injuries to a child the father has a right of action and asks: "If he has the preferential right to sue in such a case, why not where the body of the child with whose decent burial he is charged has been mutilated or disfigured by death?" Further it was said: "It seems to be settled that the right to sue in a case of this kind must go to the next of kin in the order of their seniority of rank as fixed by the law, the father, in respect to a deceased child, being placed at the head of a class, which may take in succession from the child, and there is no double headship in which he shares the right of the mother."

There was dissent by Clark, C. J., and his view seems somewhat influenced by the doctrine of mental anguish which prevails in North Carolina, this being with rights also given by the Married Women's Act of the state.

It has been held, that the next of kin has preference right to sue over personal representatives of a deceased. Griffin v. C. C. & A. R. Co., 23 S. C. 25, 55 Am. Rep. 1; Pinson v. So. R. Co., 85 S. C. 355, 67 S. E. 464; Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. On same principle it was held the husband or wife may enforce right of possession of a corpse as against his executor. Burney v. Hospital, 169 Mass. 57, 47 N. E. 401, 38 L. R. A. 413, 61 Am. St. Rep. 273.

In Koerber v. Patek, 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 656, it was said: "In the nearest relative of one dying, so situated as to be able and willing to perform the duty of ceremonious burial, there vests the right to perform it; and this is a legal right which, as said in some of the cases, it is a wrong to violate, and which, therefore, courts can and should protect and vindicate." This case also distinctly stated that executors and administrators had no rights in the matter. But if a statute gives a right of action for death to personal representatives and not next of kind, this makes a somewhat singular situation.

As differing with the Floyd case is that of Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172,

where right of action was held to be in both parents, "the persons who are lawful custodians of a deceased body" and they "may maintain an action for its desecration. * * * The mother and father certainly may join in such action."

A son with whom his deceased mother, a widow, lived was held entitled to maintain an action for the wilful and wanton mutilation of her body, against a carrier to whom it had been entrusted for carriage. Wall v. St. L. & S. F. R. Co., Mo. App., 168 S. W. 257.

Recoupment has been allowed to a brother when sued by a carrier for injury to a corpse, notwithstanding decedent left a mother and another brother. It was said he had such an interest in the body as entitled him to an action for negligence in and about carrying out the contract. Bearn v. C. C. C. & St. L. R. Co., 97 Ill. App. 24.

The principle is deducible, that, while there is not such property in a dead body as constitutes it as part of his estate and where also there is no contract respecting performance of some act in regard to same, yet there is a quasi-property in near relatives or as arising out of contract, that will support an action in favor of another.

C.

CORRESPONDENCE

SHOULD CONGRESS HAVE POWER TO LEVY A DIRECT PROPERTY TAX?

Editor Central Law Journal:

Shall the "Capitation or other Direct Tax" clause of the Constitution, be amended to permit a Federal direct general property tax, to be levied and collected (in peace and war) in connection with state and municipal taxes, under a uniform and highly perfected tax system?

I desire to ascertain, if posible, if there are any sound objections to this proposition, and I would like to hear from you relative to it, or from any subscriber, if you will publish this inquiry in your letter box.

The reasons for the amendment seem so obvious and abundant, that they need not be enumerated in this note.

Yours very truly,

H. HALDERSON.

Newman Grove, Nebr.

BOOKS RECEIVED.

A Treatise on the Law of Conversion. By Renzo D. Bowers, author of "The Law of Waiver." Boston. Little, Brown & Company. 1917. Price, $7.50. Review will follow.

HUMOR OF THE LAW.

Judge—It seems to me that you're a good-for-nothing rogue. Have you ever earned a dollar in your life? Prisoner—Yes, your honor; I voted for you once.—Judge.

The Legal Professor—Now, will some member of the class please give me three examples of common property?

The Smart Aleck—Yes, sir—cigarettes, matches and umbrellas!"—Richmond Times-Dispatch.

MISOGAMY?

The man who has three wives, or more,
Is guilty of polygamy,
But should he merely have a pair
His crime is only bigamy;
And while 'tis not a crime, 'tis said,
Monotony is having one.
I ask you, single, lawyer friends,
What is it if he should have none?

—H. S. R.

"Sweet are the uses of adversity," says Shakespeare; but the following colloquy doesn't make the proposition good.

"Ah, Sam, so you are in trouble, eh?"

"Yes, Jim, yes I am."

"Well, well, never mind, cheer up, old man, cheer up! Adversity tries us and shows us our better qualities."

"Ah, but Adversity didn't try me; it was a country judge, and he showed up my worst qualities."

One of the shortest summings up on record is believed to be that delivered by the late Commissioner Kerr at the Old Bailey in a case where a man was charged with being in the unlawful possession of a gold watch and chain.

The appearance of the prisoner certainly did not correspond with the legitimate possession of such costly ornaments, but he asserted his innocence of the charge, and declared that he had found the watch and chain on the pavement.

The judge looked at the man in the box.

"Gentlemen of the jury," he said "I have walked over the pavements of London during the last forty years, and I've never found a gold watch and chain there yet. Consider your verdict."

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

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1. **Attorney and Client**—Disbarment.—Attorney repeatedly convicted of selling wine and again convicted after being given leniency and a pardon, held to be disbarred.—State v. Johnson, N. C., 93 S. E. 847.

2. **Bailment**—Action by Bailee. — Where plaintiff placed a horse in the hands of another and it was killed at a railroad crossing, either plaintiff or the bailee could sue the railroad, or the plaintiff could sue the bailee and railroad as joint tort-feasors, or he could sue either of them alone.—Grand Rapids & I. Ry. Co. v. Resur, Ind., 117 N. E. 259.

3. **Bankruptcy**—Conditional Sale. — Petition in bankruptcy for reclamation of motors sold under conditional sale, held properly granted, securing judgment in assumpsit on two of unpaid notes given therefor, not transferring title to bankrupt purchaser.—In re Sutton, U. S. D. C., 244 Fed. 872.

4.——Constructive Notice.—That owner of premises recognized assignment of contract to purchase, and later gave deed pursuant thereto, held not to give actual or constructive notice of reservation of title to machinery placed on land by third person pursuant to contract with assignee, who became bankrupt.—In re Atlantic Beach Corp., U. S. D. C., 244 Fed. 828.

5.——Estoppel.—Trustee in bankruptcy of trading company was not estopped from pursuing claim for restitution of assets against assignee of packing company, trading company's debtor, on theory that trading company and its creditors became bound by agreement between majority stockholder in trading company and assignee company that trading company would not enforce claim against packing company's assets.—Sanborn-Cutting Co. v. Paine, U. S. C. C. A., 244 Fed. 672.

6.——Jurisdiction.—Where general assignment for benefit of creditors is followed by involuntary petition in bankruptcy against assignor, federal District Court in bankruptcy obtains exclusive jurisdiction, and has power to remove assignee, irrespective of his good faith and standing, and to appoint receiver.—In re D. & E. Dress Co., U. S. D. C., 244 Fed. 885.

7.——Parties.—A court of bankruptcy held to have power to permit the intervention of stockholders to contest a voluntary petition filed by the officers and directors, where its purpose was shown to have been fraudulent.—Zeitinger v. Hargadine-McKittrick Dry Goods Co., U. S. C. C. A., 244 Fed. 719.

8.——Referee.—Clerk of District Court is not required to distribute consideration in composition cases, as Bankr. Act, § 12, subsecs. "b," "e," and General Order No. 29 (87 Fed. xii, 32 C. C. A. xii), place such consideration entirely within control of court, and referee should be designated to make distribution.—In re Newbold, U. S. D. C., 244 Fed. 888.

9.——Set-Off.—Trustee in bankruptcy, having paid note of bankrupt, cannot set off amount thereof against claim of accommodation maker or indorser of note.—In re Jules Bouy & Co., U. S. D. C., 244 Fed. 896.

10. **Banks and Banking**—Duty to Depositor. —A bank with which a person has a deposit assumes responsibility for the erroneous payment of any check not drawn or authorized by the depositor.—Bank of Brunswick v. Thompson, N. C., 93 S. E. 849.

11.——Lien.—§ 2354, giving liens to creditors of bank for collections on collaterals, is not invalid on ground that no provision was made for asserting and foreclosing lien, and no time was fixed by statute as to when it should begin to operate; it not being necessary that section should contain in itself a prescribed procedure for enforcement of lien.—Collins v. American Exch. Nat. Bank of New York, Ga., 93 S. E. 880.

12. **Bills and Notes**—Consideration.—Note by widow in settlement of her deceased husband's debt, where husband left no estate, was without consideration and void.—Sykes v. Moore, Miss., 76 So. 538.

13. **Carriers of Goods**—Act of God.—An unprecedented flood overflowing a railroad yard was within a provision of a bill of lading exempting carrier from liability for any loss caused by "act of God."—Porter Screen Mfg. Co. v. Central Vermont Ry. Co., Vt., 102 Atl. 44.

14.——Conversion.—There is a conversion, where consignee, after fruitless efforts at adjustment, makes unconditional offer to pay all carrier's charges, and it refuses the money and sells the goods.—Dowling v. Seaboard Air Line Ry., S. C., 93 S. E. 863.

15.——Evidence.—In action for one-half of rice crop alleged to have been damaged in transit, testimony as to condition at destination of

other half, shipped over same route, was inadmissible, where proof failed to show that it was handled similarly to that in controversy.—Gulf Coast Transp. Co. v. Standard Milling Co., Tex., 197 S. W. 874.

16.——Notice.—Consignor's letter to carrier, stating, "We will thank you to hold up delivery until you receive our telegraphic instructions," etc., held sufficient notice to stop delivery.—Phillips-Patterson Co. v. Northwestern R. Co. of South Carolina, S. C., 93 S. E. 868.

17. **Carriers of Passengers**—Lex Loci.—The validity of a provision of the contract of employment of a Pullman porter, exempting railroad companies over whose lines he might run from liability for his personal injury, held governed by the law of the state where made and where suit was brought, although the injury occurred elsewhere.—Eubanks v. Southern Ry. Co., U. S. D. C., 244 Fed. 891.

18.——Negligence.—In an action against a street railway, evidence that plaintiff's shoe heels came off, having caught in step, without any evidence as to kind of step, was insufficient to show negligence on part of the street railway.—Kerr v. Worcester Consol. St. Ry., Mass., 117 N. E. 310.

19.——Protection.—Railroad is not liable to passenger assaulted and robbed on its train, cars being without light and badly overcrowded, there being no casual connection between road's supposed negligent act in overcrowding and failing to light its cars, and injury charged to have resulted.—Chancey v. Norfolk & W. Ry. Co., N. C., 93 S. E. 834.

20. **Chattel Mortgages**—Conversion. — Landlord, knowing of deed of trust on tenant's share of crop, who sold the crop, kept part of the proceeds to reimburse himself and paid the rest to the tenant, held guilty of a conversion.—Evans v. Carpenter, Miss., 76 So. 550.

21. **Contracts**—Public Policy.—Voting trust created by majority of stockholders to induce a loan to the corporation, held not against public policy.—Clark v. Foster, Wash., 167 Pac. 908.

22. **Corporations**—Promoters. — Where promoters made advancements sufficient to cover stock, and afterwards gave their checks for the stock, and checks were immediately issued to them for like amounts, there was no violation of the statute prohibiting the issue of stocks for other than a money payment.—Wing v. Credit Guide Co., Ia., 164 N. W. 627.

23.——Public Policy.—The term "public policy," is of uncertain definition, and each case must be determined according to terms of instrument; but that which is not prohibited by statute, condemned by judicial decision, or contrary to public morals, contravenes no principle of public policy.—Liggett v. Shriver, Ia., 164 N. W. 611.

24. **Damages**—Expenses.—In action for damages to escaping cattle, plaintiff was not entitled to recover expense incurred in going to and from his residence, five miles from the pasture, in order to return the cattle.—Freeman v. Missouri Pacific Ry. Co., Kan., 167 Pac. 1062.

25.——Measure of.—In passenger's action for personal injury from negligence of street railway, held, that expense of her curative trip to California could not be considered as a natural and proximate consequence of defendant's wrongful act.—Benoe v. Duluth St. Ry. Co., Minn., 164 N. W. 662.

26.—Minimizing.—Where plaintiff with slight trouble and expense could have placed barrels for watering his cattle near a polluted swale, allowing water to percolate through the soil into the barrels, held that it was his duty to minimize the damage.—Adams v. Clover Hill Farms, Ore., 167 Pac. 1015.

27. **Death**—Presumption from Absence.—If seven years' absence follows occurrence whereby the absent one was subjected to peril of his life of such a character that the evidence of his death might be destroyed with death itself, the inference may be drawn that the death occurred at the time of such peril.—Connor v. New York Life Ins. Co., N. Y., 166 N. Y. S. 895.

28. **Electricity**—Instructions.—In an action for death of plaintiff's husband, who came in contact with defendant's high tension wire, charge that if deceased failed to exercise ordinary care or was guilty of contributory negligence, there could be no recovery, held not erroneous because not qualified by statement deceased was guilty of contributory negligence if he voluntarily or of his own free will failed to exercise ordinary care.—Patton v. Union Traction Co., Kan., 167 Pac. 1041.

29. **Eminent Domain**—Special Benefit. — Increased value to land enjoyed in common with others affected by improvement is not "special benefit."—Lanier v. Town of Greenville, N. C., 93 S. E. 850.

30. **Executors and Administrators**—Causes of Action.—One who procures allowance of claims against an estate is not, by reason of knowledge that he has another independent cause of action against estate and administrator, precluded by such knowledge from recovering on separate cause of action.—Ryan v. Myers, Kan., 167 Pac. 1043.

31.——Collateral Attack. — An attack by strangers on a sheriff's deed on execution sale in an action separate from that in which it was issued, on the ground that out of proceeds of sale current taxes were not paid, is collateral, and cannot be maintained.—Clark v. Tandy, Kan., 167 Pac. 1039.

32.——Quantum Meruit.—In an action on a quantum meruit to recover for services rendered deceased, who breached oral agreement to devise unenforceable under statute of frauds, held that plaintiff could only recover value of such services, but in computing it, financial condition, etc., of deceased should be considered.—Quirk v. Bank of Commerce & Trust Co., U. S. C. C. A., 244 Fed. 682.

33. **Explosives**—Contributory Negligence. — Act of using kerosene for starting new fire does not preclude user from recovering from refiner of oil for injuries from explosion, on ground he was guilty of contributory negligence as matter of law.—McLawson v. Paragon Refining Co. of Michigan, Mich., 164 N. W. 668.

34.——Nuisance.—In action for damage by explosion on theory that storing powder was nuisance, it was error to admit testimony showing defective construction of magazine.—Fernandez v. Western Fuse & Explosives Co., Cal., 167 Pac 900.

35. **Fixtures**—Conditional Sale.—Mill machinery sold under contract of conditional sale and attached only by bolts and screws, and which could be removed without injury to the mill, was not a fixture which under L. O. L., § 7414, could not be removed.—Meyer v. Pacific Machinery Co., U. S. C. C. A., 244 Fed. 730.

36. **Fraud**—Exemplary Damages.—In an action for fraud in sale and exchange of corporate stock, where it appeared defendant's misrepresentations were wantonly and maliciously made, exemplary damages may be allowed.—Kluge v. Ries, Ind., 117 N. E. 262.

37.——False Statements.—Where defendant promised plaintiff that if he got him a tenant for a theatre he would enter into a written contract to give him a commission and induced him by false statements to take a contract from an insolvent corporation in substitution, plaintiff was injured by the false statements.—Ochs v. Woods, N. Y., 117 N. E. 305, 221 N. Y. 335.

38.——Verdict.—Where the jury found that there was fraud in the sale of corporation stock, a further finding that plaintiff was damaged by relying on representations made by defendants looking to a settlement, in that he was thereby caused to refrain from prosecuting his claims, held not inconsistent.—Campbell v. Creighton, Cal., 167 Pac. 975.

39. **Frauds, Statute of**—Part Performance.—Delivery of part or all of personalty forming subject of contract of sale did not tend to validate under statute of frauds, alleged sale of other personalty, under separate oral contract, made several days later.—Hess v. Dicks, Ia., 164 N. W. 639.

40. **Fraudulent Conveyances** — Evidence. — There is no difference between a sale which leaves nothing and a sale which leaves a paltry and insufficient amount for creditors.—Ludlow Savings Bank & Trust Co. v. Knight, Vt., 102 Atl. 51.

41. **Gifts**—Delivery.—Owner of stock, indorsing assignment thereon and placing it in sealed envelope with letter to her executors, stating that it was a gift to the assignee, held not to have made a completed gift thereof.—Bailey v. Orange Memorial Hospital, N. J., 102 Atl. 7.

42. **Good Will**—Bankruptcy. — Purchase of part of goods of a bankrupt, which had been licensed to manufacture patented articles, does not, by reason of purchaser's subsequent manufacture of patented articles under a license from patentee, carry with it good will of bankrupt. —Mumford Molding Mach. Co. v. E. H. Mumford Co., N. J., 102 Atl. 9.

43. **Guaranty**—Bankruptcy.—The creditor is not precluded from relying on a guaranty of a debt by proving his claim in bankruptcy against the debtor and receiving a dividend.—Richmond Paper Co. v. Bradley, Miss., 76 So. 544.

44. **Habeas Corpus**—Intimidation. — Habeas corpus will not issue, on petition of prisoner in state penitentiary under conviction of rape, to secure his release from confinement on ground his conviction was procured by intimidation of prosecutrix, leading her to commit perjury.—Springstein v. Saunders, Ia., 164 N. W. 622.

45.——Jurisdiction.—On habeas corpus by prisoner in custody under sentence, inquiry is limited to whether court had jurisdiction of prisoner's person and of crime charged, and if it had jurisdiction to convict and sentence, writ cannot issue to correct mere errors.—Ex parte Stover, Okla., 167 Pac. 1000.

46. **Highways**—Admissibility of Evidence.—In an action for collision with auto truck at a street corner, a question, "What kind of a turn did defendant's truck customarily make?" at such corner, was incompetent, as an act in issue cannot be proved by evidence that it had been defendant's custom to turn close to the curb.—Luiz v. Falvey, Mass., 117 N. E. 308.

47. **Homicide**—Evidence of Intoxication.—On charge of manslaughter by reckless driving of automobile, showing that defendant was intoxicated is persuasive to conclusion that charge is well founded.—State v. Salmer, Ia., 164 N. W. 620.

48. **Hospitals**—Scope of Employment.—If an operating nurse in a private hospital stole a ring from a patient under the influence of ether, the hospital was not liable, on the ground that in stealing the ring the nurse was acting within the scope of her employment.—Vannah v. Hart Private Hospital, Mass., 117 N. E. 328.

49. **Husband and Wife**—Indemnity Policy.—Indemnity liability incurred by husband held not charge against community property; husband's voluntary act in executing indemnity agreement having resulted in no benefit to community.—American Surety Co. of New York v. Sandberg, U. S. C. C. A., 244 Fed. 701.

50.——Separation Contract.—A clause in a separation contract, "that each of them will not interfere * * * with each other in the future," did not imply forever, nor deprive the parties of the right of terminating the agreement, and the same was abrogated by the husband requesting his wife's return.—Carl v. Carl, N. Y., 166 N. Y. S. 961.

51. **Innkeepers**—Bailee.—Where an overcoat is checked at a restaurant, the restaurant is not liable as bailee for the loss of a purse and contents in the pocket thereof, unless it has actual notice of their presence therein, or the presence of similar articles might be presumed. —Robin v. Colaizzi, N. Y., 166 N. Y. S. 978.

52. **Insurance**—Assignment.—An assignment of life insurance policy to "the children of W. T. J. and B. H. J.," when W. T. J. had been before married and by such marriage had three children, passed the interest in the policy only to the children of the second marriage.—Brown v. Aetna Life Ins. Co., N. C., 93 S. E. 842.

53.——Cancellation.—Premium on policy held never "actually paid," where agent of broker through whom policy was taken out absconded with the premiums, and insurer was not liable, after cancellation for such nonpayment, on a loss three days after such cancellation.—Peretzman v. Insurance Co. of Pennsylvania, Pa., 102 Atl. 22.

54.——Description of Property.—Under policy covering grocery store and additions adjoining and communicating, a shed built by insured in which to store groceries, held covered by the policy, though not structurally connected with the store building.—Taylor v. Northwestern Nat. Ins. Co., Cal., 167 Pac. 899.

55.——Foreign Corporation in State.—Collection of premiums on several hundred insurance

policies, representing insurance of over $1,000,000, by company which had attempted to formally withdraw from the state, held doing business.—Hagler v. Security Mut. Life Ins. Co., U. S. D. C., 244 Fed. 863.

56.——Insurable Interest.—A married woman who, with her own funds, constructs a house upon a lot belonging to her husband, under an agreement that he will convey such lot to her, has an insurable interest therein.—Hawkins v. Southwestern Mut. Fire Ins. Co., W. Va., 93 S. E. 873.

57.——Option Contract.—Policy, giving half total insurance for loss of eye with "the option to continue this covenant in force till death," when other half will be paid, does not convert remainder into ordinary life policy and prevent recovery for further accidents.—Eminent Household of Columbian Woodmen v. Bunch, Miss., 76 So. 540.

58.——Renewal.—That the misrepresentations complained of were made in the application for the original policy and that the policy sued upon was a renewal policy is immaterial.—Solomon v. Federal Ins. Co., Cal., 167 Pac. 859.

59.——Voidability.—Provision in fire policy, declaring it void if prohibited article be kept or used on premises, means only that it shall be voidable at election of insurer.—Insurance Co. of Pennsylvania v. Indiana Reduction Co., Ind., 117 N. E. 273.

60. **Intoxicating Liquors**—Licenses. — Liquor Tax Law, § 8, as amended by Laws 1917, c. 623, as to designating places for sale of intoxicating liquors, does not require an apportionment as nearly as possible to the number of places then licensed, but vests a discretion in the board, and its determination, in the absence of abuse of such discretion, is final.—In re Hickey, N. Y., 166 N. Y. S. 974.

61.——Unlawful Possession.—In prosecution for violating ordinance of city by having in possession more than two quarts of intoxicating liquor, other than beer, ownership of liquor found in defendant's possession was immaterial.—City of Seattle v. Brookins, Wash., 167 Pac. 940.

62. **Landlord and Tenant**—Life Expectancy.—Where a lease for 50 years reserved rent, which was to depend on appraisals every five years, the lessees cannot escape liability because the covenant for payment of rent extended beyond their life expectancy.—Johnson v. Norman, Wash., 167 Pac. 923.

63.——Negligence.—Where owners of building were not negligent in maintaining sink on upper floor, held, it not appearing who clogged sink and left water running, they were not liable to plaintiff, sub-lessee of lower premises, whose goods were injured by water.—Leavitt v. Williams, Me., 102 Atl. 39.

64. **Libel and Slander**—Married Woman.—To say of a married woman that she became pregnant and had children, born or aborted, before her marriage, is slanderous per se.—Martens v. Martens, Ia., 164 N. W. 645.

65. **Mandamus**—Regulation of Utilities. — Laws 1907, c. 966 (Revisal 1905, § 1096), giving "regulation and control" of telephone companies to the Corporation Commission, does not deprive the courts of the jurisdiction by mandamus to compel a telephone company to install a telephone, a duty arising from facts established.—Walls v. Strickland, N. C., 93 S. E. 857.

66.——Remedy.—Where township ordinance authorized street railway to construct road, mandamus will not be awarded to compel construction of road where there was no legal right to cross steam railroad, as required by the ordinance, and railway was unable to secure such right.—Hamilton Tp. v. Mercer County Traction Co., N. J., 102 Atl. 3.

67. **Marriage**—Presumption of.—To raise a presumption of common-law marriage, the evidence must be clear and convincing; and where there is evidence to negative it, such presumption must fail.—Meehan v. Edward Valve & Mfg. Co., Ind., 117 N. E. 265.

68. **Master and Servant**—Accident. — Injury held to be by accident arising out of and in course of employment, within Workmen's Compensation Act (Act April 4, 1911, P. L. 134), notwithstanding disobedience of orders as to the way in which work should be done.—Kolaszynski v. Klie, N. J., 102 Atl. 5.

69.——Accident. — Workmen's Compensation Act, 1915, § 31(a), specifying compensation for loss by separation of "not more than two phalanges of a finger," applies where only one-eighth of the first phalange of a finger is lost, and the employe is entitled to the compensation provided therein.—H. K. Toy & Novelty Co. v. Richards, Ind., 117 N. E. 260.

70.——Defective Tools.—Owner of a cotton mill held not liable for injury to an employe by stepping on an iron pipe which had been temporarily left in a passageway by other workmen, as such pipe was not a defect in the way under the statute.—International Cotton Mills v. Pernod, U. S. C. C. A., 244 Fed. 723.

71.——Evidence.—In an action for death of a servant, it was not error to permit another servant to testify that his hat was knocked off by a bridge built too near the track, which bridge struck deceased and killed him; such testimony not being offered to show another act of negligence, but to meet testimony that the bridge would not strike anyone.—Vallery v. Barrett, Colo., 167 Pac. 979.

72.——Workmen's Compensation Act.—Under Workmen's Compensation Act, § 25, requiring employer to furnish injured employe with physician during 30 days after injury, physician is entitled to payment for services rendered within 30-day period after employe who received a blow on the forehead, developed an abscess in frontal sinus.—In re McCaskey, Ind., 117 N. E. 268.

73.——Workmen's Compensation Act.—Where one, entitled to compensation under Workmen's Compensation Act prior to amendment of 1913, obtained an award for permanent disability and died before lapse of maximum number of weeks for which statute authorized compensation, the right to compensation ceased.—Erie R. Co. v. Callaway, N. J., 102 Atl. 6.

74.——Workmen's Compensation Act.—Notice that employes of insured would receive medical attention at hospital, held sufficient compliance with Workmen's Compensation Act, and physician employed by servant cannot recover from insurer.—In re Davidson, Mass., 117 N. E. 310.

75. **Municipal Corporations**—Interest.—Where ordinance of city, continued in force by new charter, provided that payment for services

should be on tenth of month succeeding month in which rendered, officer whose salary was wrongfully withheld, is entitled to interest thereon from time of withholding.—Rockwood v. City of Cambridge, Mass., 117 N. E. 312.

76.——Last Clear Chance.—Where driver of automobile could not have avoided colliding with and running over rider of motorcycle after he actually saw latter's perilous position, he was not liable on ground of last clear chance.—Bullis v. Ball, Wash., 167 Pac. 942.

77.——Supervision of Streets.—Municipal authorities must exercise such reasonable supervision over street improvement work as to see to it that proper lights at night are placed at excavation and at piles of dirt and obstructions incident thereto.—Hardy v. West Coast Const. Co., N. C., 93 S. E. 841.

78. **Notice**—Recording Instrument.—Recording of instrument not entitled to record, is not constructive notice of its content.—In re Atlantic Beach Corp., U. S. D. C., 244 Fed. 828.

79.——Weather Predictions.—Newspaper articles based on weather observer's forecast do not have the legal effect of constructive notice, and at most are only actual notice, and not that unless they are read.—Porter Screen Mfg. Co. v. Central Vermont Ry. Co., Vt., 102 Atl. 44.

80. **Perjury**—Materiality.—Materiality of defendant's false testimony, before a grand jury investigating charge of bribery, as to source of certain money received by him, did not depend upon grand jury's subsequent action, or on whether defendant was party to bribery.—People v. Howland, Colo., 167 Pac. 961.

81. **Railroads**—Switch Tracks.—Municipality might under the police power order removal of switch track at street intersection, regardless of right under which it was originally established and maintained.—City and County of Denver v. Denver & R. G. R. Co., Colo., 167 Pac. 969.

82. **Reversions**—Condition.—Where land is conveyed with reverter to grantor, on grantee's failure to use it for certain purpose for certain time, and same grantor afterwards conveys to another unconditionally, land, if reverting after grantor's death, reverts not to his heirs, but to second grantee.—Irby v. Smith, Ga., 93 S. E. 877.

83. **Taxation**—Life Estate.—Life estate of son in remainder, after death of testator's widow, a life tenant with power to use principal, was subject to a transfer tax.—In re Bloss' Estate, N. Y., 166 N. Y. S. 1005.

84. **Telegraphs and Telephones**—Mental Anguish.—Although defendant telegraph company did not know at time money was telegraphed to plaintiff that she would need it to go to her mother's funeral, where it later received message for plaintiff announcing her mother's death and failed to deliver money, held, it was liable in damages for pecuniary loss and mental anguish.—Le Hue v. Western Union Telegraph Co., N. C., 93 S. E. 843.

85.——Valuation.—On allegation that telephone exchange rates in single city are unreasonable, Corporation Commission in adjusting rate should separate valuation of toll plant from that of exchange plant and equitably apportion between them the value of property used in common in giving both services.—Pioneer Telephone & Telegraph Co. v. State, Okla., 167 Pac. 995.

86. **Theaters and Shows**—Evidence.—In action against amusement company for slipping on sheet of suspended metal, plaintiff's evidence, in speaking of holding to rail, that she "felt afraid of it," and "did not know what to expect," and "was afraid of an electric shock," was competent, as bearing upon her due care.—Ferry v. Eastern Consol. Amusement Co., Mass., 117 N. E. 308.

87. **Trades Unions**—Expulsion of Member.—An expelled member of trade association is only entitled to a hearing in accordance with laws and rules of association.—Pratt v. Amalgamated Ass'n of Street and Electric Ry. Employes of America, Utah, 167 Pac. 830.

88. **Trusts**—Acceptance of Benefit.—Where plaintiff had accepted and retained benefits under a written declaration of trust to pay him what was due on his building contract, he was required to take the provisions therein cum onere.—Jourdan v. Andrews, Pa., 102 Atl. 33.

89.——Constructive Trustee. — Complainant, who purchased outstanding shares of stock owned by a third stockholder, is not constructive trustee in favor of defendant, who had option to purchase, where defendant did not attempt to exercise his option within a reasonable time after notice.—Lockward v. Evans, N. J., 102 Atl. 19.

90.——Surplus Profits.—Surplus profits, accumulated during the testator's lifetime, but not divided until after his death, belong to the corpus of his estate, while dividends from earnings after his death, whether in cash or stock, are income payable to the life tenant.—In re Sloan's Estate, Pa., 102 Atl. 31.

91. **Sales**—Common Counts.—In an action on common counts for goods sold, recovery is on the quantum meruit, regardless of whether price was fixed by agreement between parties or whether it is fair value of property as found by jury.—Alburn v. Burge, Ind., 117 N. E. 257.

92.——Conditional Sale.—Purchase of machinery sold under conditional sale contract from buyer's assignee, made by cashier of bank for the bank on account of its claim against buyer, lacked essential elements of bona fide purchase for value.—Meyer v. Pacific Machinery Co., U. S. C. C. A., 244 Fed. 730.

93.——Rescission. — Defendant having contracted to buy saws of plaintiff, and plaintiff having shipped saws of amount and quality ordered, defendant had no right to return them to plaintiff without its consent, and it was not bound to receive them, and could reject defendant's proposal that it take them back and cancel the contract.—Branch Saw Co. v. Bryant, N. C., 93 S. E. 839.

94. **Specific Performance**—Enforceability. — Real estate agent, employed to find a buyer, who failed to communicate an offer to his principal, so that principal named a lower price, at which agent agreed to take it himself, could not enforce specific performance of contract.—Kurt v. Moscript, Kan., 167 Pac. 1065.

95.——Right to Enforce.—Where purchaser contracted for land and agreed to pay a mortgage to be executed on the land by the seller, who filed his deed to purchaser without executing the mortgage, seller cannot compel purchaser to execute a mortgage for the specified amount.—Tuttle v. King, Ia., 164 N. W. 616.

96. **Street Railroads**—Negligence.—It was not incumbent upon motorman to stop when he first observed plaintiff, or when he observed that her horse was becoming unmanageable, but to have car under such control that it could have been stopped when stopping was necessary.—Anderson v. Missoula St. Ry. Co., Mont., 167 Pac. 841.

97. **Sunday**—Public Sports. — Under Laws 1917, c. 223, amending Comp. Laws 1913, § 9238, forbidding public sports or shooting on Sunday, the shooting of crows as a private diversion, not witnessed by the general public, and not attracting a crowd, did not constitute offense of "Sabbath breaking."—State v. Davis, N. D., 164 N. W. 698.

98. **Vendor and Purchaser**—Rescission.—A contract for a deed of land adjoining the Missouri River cannot be rescinded for depreciation on account of a change in the course of the river, as the possibility of such a change must have been known at the time of the contract.—Tuttle v. King, Ia., 164 N. W. 616.

99. **Waters and Water Courses**—Percolation. —Property rights relative to passage of percolating waters from land of one owner to and through the land of another owner, are correlative, and each owner is restricted to a reasonable use of his property.—Cason v. Florida Power Co., Fla., 76 So. 535.

100.—Prior Appropriation—Prior appropriator of water does not acquire title to specific water, but merely right to use of specific quantity for limited time in year or during whole year; though owner has acquired prior right to use of water, if he does not use it during portion of year, or cannot make it available by reason of natural conditions, another may use it while he cannot.—Cleary v. Daniels, Utah, 167 Pac. 820.